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No. 89-150

In the Supreme Court of the United States

OCTOBER TERM, 1989

MONROE SYSTEMS FOR BUSINESS, INC.,
Petitioner,

vs.

WALTER L. BROOKS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT WALTER L. BROOKS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. The Eighth Circuit's Decision Correctly Applied the Law and Is in Harmony With the Decisions of Other Circuits Which Hold That an Employee Can Prevail by Means of Indirect Evidence That the Employer's Reason Is Unworthy of Credence.

II. No Conflict Exists Between the Eighth Circuit and the Eleventh Circuit in That Both Correctly Apply the Burden of Proof Established by This Court in *Burdine*.

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COUNTERSTATEMENT OF THE CASE

Respondent Walter L. Brooks ("Brooks") was first employed by petitioner Monroe Systems for Business, Inc. ("Monroe") on May 1, 1956. Except for approximately six weeks in 1974 and four months in 1977, he was continuously employed until he was terminated on August 16, 1985. (2Tr.p.118 ls.11-19). Respondent was born on December 14, 1930, and 54 years of age at the time of his dismissal. (1Tr.p.29 ls.20-22; 2Tr.p.122 ls.18-23).

Due to an austerity program, Monroe decided to terminate one serviceman from the Kansas City office. A

month and a half before respondent was fired Monroe demoted Harry Sechrest who had been the service manager and brought in a new service manager, Tony Leier. This action had the net effect of adding another serviceman. The other individuals employed in the service department were respondent, Ron Cunningham, Byron Taylor, Sechrest, Fred Taylor and Brian Munsell. (1Tr. p.21 ls.11-16). These employees were divided into three classifications. The first, Trainee, was the entry level position. The next step was Customer Service Representative (CSR). The highest non-management position was Customer Service Engineer (CSE). CSEs were sometimes referred to as Service Technicians. (1Tr.p.7 ls.2-3; 2Tr.p.45 ls.8-10).

Respondent, Cunningham, Byron Taylor and Sechrest were all CSEs. Brian Munsell was a CSR, and Fred Taylor was a Trainee. (1Tr.p.22 ls.17-p.23 ls.2). The respective ages, salaries and dates of hire of these individuals are listed in defendant's Amended Exhibit 61. (J.A. p.133). At age fifty-four (54) respondent was the oldest of these employees. Defendant was told at the time of his termination that his seniority date, for retirement and all other purposes, was December, 1977, the date he was last rehired. (1Tr.p.45 ls.2-8). Within four to six (4-6) weeks prior to trial, petitioner determined that respondent's seniority date, for retirement purposes only, was November, 1974. (1Tr.p.45 ls. 9-16). This date would make respondent more senior than Byron Taylor. Petitioner proffered no explanation for why it did not adjust respondent's seniority date back to March, 1956, respondent's original date of hire, in light of the fact that the 1977 "gap" in respondent's employment which petitioner ignored was three to four

(3-4) months, while the 1974 lapse was only six to eight (6-8) weeks. (1Tr.p.118 ls.11-19). The 1956 employment date makes respondent the most senior repairman in petitioner's Kansas City office.

Of the service department employees, Cunningham, Sechrest and Munsell had formal copier repair training and regularly made service calls on copiers in the field. (2Tr.p.22 ls.1-5). Respondent did not have formal training on copiers (1Tr.p.11 ls.5-7), but did engage in informal training by studying service manuals and learning from other copy repairmen in the office. (1Tr.p.71 ln.22-p.72 ln.11). Respondent's managers at the District and Regional levels denied respondent's repeated requests for such training, but encouraged him to continue self-study by reading the manuals. (1Tr.p.12 ls.3-10; 1Tr.p.196 ls. 18-22). Respondent was capable of repairing virtually all machines sold or serviced by petitioner, including copiers. (1Tr.p.29 ls.15-17; 1Tr.p.195 ls.15-17). In fact, respondent was frequently called upon by other repairmen to help them repair or diagnose troublesome breakdowns, particularly electrical problems with copiers. (1 Tr.p.121 ls.9-14; 1Tr.p.195 ls.19-13; 2Tr.p.36 ls.17-33). Respondent spent only about five to ten percent (5-10%) of his time repairing computers. (1Tr.p.8 ls.14-19). Fred Taylor may have had some formal copier repair training at a former employer, but did not make regular service calls for petitioner. (2Tr.p.22 ls.1-5). He was originally hired as a "go-for" and "stockboy". (1Tr.p.121 ln.24-p.122 ln.6; 2Tr.p.6 ls.1-15; 2Tr.p.151 ls.10-13). By the time of respondent's termination, Fred Taylor was allowed to perform preventative maintenance or cleanup work on copiers. (1Tr.p.82 ls.3-12; 1Tr.p.83 ls.15-19; 2Tr.p.6 ls.16-18). He did not make actual repairs on copiers, and

was unable to service calculators, petitioner's other primary product line. (1Tr.p.84 ls.20-23; 1Tr.p.155 ls.15-18; 1Tr.p.145 ls.5-6; 2Tr.p.158 ln.22-p.159 ln.1). Immediately following respondent's termination, petitioner sent Fred Taylor to copier repair school. (2Tr.p.10 ls.9-11). All parties agree that Byron Taylor had absolutely no copier repair training or experience. (1Tr.p.53 ln.19-p.54 ln.1; 2Tr.p.134 ln.23-p.135 ln.2). Shortly before respondent's termination the company determined that its computer line of business equipment should be discontinued.

The testimony conflicted between several witnesses who had been in management at the time respondent was fired. Petitioner proffered the reason for respondent's discharge on the basis that he was the least senior member of the computer division, and Monroe was phasing out computers. The jury found that Monroe's proffered reason was a pretext for age discrimination.

The Kansas City office did not have a "systems computer division." Further, management employees gave conflicting reasons for the termination of respondent. Tony Leier, the new service manager, testified that he chose Walter Brooks as the person to be terminated because he had narrowed the decision to the two people (respondent and Byron Taylor) without copier training. He testified he then chose respondent because he was the least senior of the two. (1Tr.p.100 ls.4-20; 2Tr.p.126 ln.17-p.127 ln.18). As previously discussed, petitioner used a different seniority date for retirement than for seniority in the case of respondent. On the other hand, Clay Sturrock, the sales manager, testified that he was told to fire one of the servicemen with the highest salary and that fact forced him to decide between respondent and Ronald Cunningham. He said he chose Brooks

because he did not have the extensive copier repair experience that Cunningham did. (1Tr.p.115 ls.13-20).

Monroe's position was that no consideration was given to either Fred Taylor, age 34 and an employee for less than a year and a half, or Brian Munsell, age 25 and an employee for a year and eight months. Several witnesses testified that Fred Taylor was the "go-for" for the group with limited training or experience. Further, Walter Brooks had made many repairs on computers and, due to the increasing sophistication of copiers, had repaired the computer components of most new copiers.

The jury found that petitioner had discriminated on the basis of age when it fired a 54-year old employee who had nearly 29 years with the company and a wide array of repair skills while retaining a 34-year old employee who had been with the company a little more than a year performing the function of a "runner" for the service department. This unjustified action was accentuated by the fact that this 34-year old employee was sent to copier school the week following the decision to terminate the oldest employee in the department, Brooks.

Respondent could easily have shifted the emphasis of his repair work had the petitioner made it known that copier repair training was of utmost importance. During the course of his employment, respondent had even requested to go to one of the copier schools. It is obvious that the emphasis on copiers was not the basis for the decision to fire respondent but rather a less than credible excuse for firing him because of his age. The jury so found and returned a verdict in favor of respondent for $44,000. The trial court entered judgment in

favor of respondent on the basis of the verdict and denied the petitioner's motion for judgment notwithstanding the verdict or, in the alternative, a new trial. The Eighth Circuit panel unanimously affirmed the lower court's judgment and summarily denied petitioner's request for rehearing and rehearing in banc because petitioner's requests were filed out of time.

Petitioner then filed the instant Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REASONS FOR DENYING THE WRIT

I.

The Eighth Circuit's Decision Correctly Applied the Law and Is in Harmony With the Decisions of Other Circuits Which Hold That an Employee Can Prevail by Means of Indirect Evidence That the Employer's Reason Is Unworthy of Credence.

This Court established the specific elements of proof required in making out a prima facie case in Age Discrimination Employment Act cases. 29 U.S.C. §§ 621 et seq. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Once the prima facie case is established, the burden then shifts to the defendant to articulate some legitimate nondiscriminatory reason for the discharge. *Id.* at 802. If such a reason is offered, the burden then shifts back to the plaintiff to prove that the reason is a pretext. *Id.* at 804. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1980), this Court

held that a plaintiff may meet the burden of proving pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256.

Petitioner contends in its brief at page 12 that an ADEA plaintiff must prove more than the pretextual reason is unbelievable in that "the reason must be presented in connection with evidence of prohibited discriminatory intent." *Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit*, p. 12. In support of that proposition, petitioner cites cases from several other circuits. A close review of those cases reveals that those courts did not hold that an ADEA plaintiff must only challenge the employer's proffered reason with evidence that directly shows the employer's discriminatory motive. For instance, in *White v. Vathally*, 732 F.2d 1037 (1st Cir. 1984), the Court was discussing the general proposition that an employer could not be faulted for a bad business decision.

The district court in *White* had found in favor of defendant employer on plaintiff's sex discrimination claim. On appeal, the First Circuit addressed the issue of whether there was sufficient facts to find that the employer had shown a legitimate, nondiscriminatory reason for the dismissal. In finding that the evidence did support the trial court's decision, Judge Bownes determined that the plaintiff did not carry her burden by simply refuting the defendant's articulated reason. Such a holding did not suggest that disproving the reason given cannot be evidence of improper motive. Rather, the First Circuit noted that the employee's evidence which brings into question the employer's reason is not

enough, in an appellate review,[1] to overcome the trial court's finding of no discrimination where the employer's explanation was not clearly "unworthy of credence." *Id.* at 1043. However, in discussing cases where direct evidence is lacking as Petitioner contends herein, the First Circuit confirms the same standard applied by the Eighth Circuit:

> Of course, when direct evidence is lacking, this burden may be met by an adequate showing of circumstantial evidence from which inferences concerning intent may properly be drawn.

Id. at 1043.

In its opinion in the present case, the Eighth Circuit did not focus on the defendant's general business decision that it desired to dismiss one of the persons in the service department. To discredit that general business decision would not, in and of itself, be sufficient to show age animus. Nor did the Eighth Circuit hold that proving the decision to fire respondent was unbelievable was was sufficient alone to prove age discrimination. It did properly hold that submission of a discredited reason is evidence of a discriminatory motive. *Brooks v. Monroe Systems for Business, Inc.*, 843 F.2d 202, 204 (8th Cir. 1989). Therefore, when the employer [petitioner] acted on that decision and chose respondent as the person to fire, the employer's reason that respondent lacked copier experience could be viewed as a pretext for discrimination in light of the surrounding circumstances.

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1. The present case involves appellate review of a verdict, judgment and appellate decision that was favorable to the employee and the only question was whether there were sufficient facts in evidence to support the verdict, judgment and unanimous appellate panel's decision.

There was additional evidence presented in connection with the selection of respondent as the person to be fired, such as respondent: 1) had requested to go to copier school on several occasions, 2) had substantial in-shop copier repair experience, 3) had substantial knowledge of the copier equipment, and 4) had received very high performance ratings prior to his discharge. Moreover, petitioner sent the least senior repairman, who was described by several witnesses as the "go-for," to copier school the week after respondent was fired. Inconsistent testimony by the two management employees of petitioner were also factors which the jury could consider in finding that the proffered reason of petitioner was a pretext for age discrimination. "Although no single piece of Brooks' indirect evidence proves discrimination, the evidence viewed, in its entirety was sufficient to support the jury's verdict." *Id.* at 204.

Petitioner also cites *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988), wherein the Fifth Circuit reversed and remanded the district court's order granting summary judgment for the employer. Bienkowski, a security guard was fired after his supervisor's ratings of his performance steadily declined. The lower court found there was no facts which raised a jury question. In reversing that decision, the Fifth Circuit noted that discrediting the employer's proffered reason is not sufficient to show age discrimination, in and of itself.[2] *Id.* at 1508. Such a ruling does not infer that

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2. Once the case has been tried, rules about the prima facie case, defendant's response and methods of proof are no longer relevant. The remaining issue is whether there is sufficient evidence to support a finding that age was a determining factor in the dismissal of plaintiff. *Kier v. Commercial Union Ins. Co.*, 808 F.2d 1254, 1257 (7th Cir. 1987). Disbelief of the employer's proffered reason is entertwined with the other evidence which shows age animus.

such evidence cannot be considered as support for a discriminatory motive. It is important to note that Judge Jones, in writing the opinion, cited another Fifth Circuit opinion, *Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985):

> *Thornbrough*, 760 F.2d 633, is inaptly cited by Bienkowski for the proposition that proof of error in an employer's articulated reasons for discharge may be alone sufficient to support a finding of intentional discrimination. *Thornbrough* was a reduction in force case in which the plaintiff had been furloughed while other much younger employees were retained. Actual disparate treatment among allegedly similarly situated employees thus appeared on the face of the plaintiff's evidence.

Bienkowski, supra at 1508. It is apparent that the Fifth Circuit would agree that in the present case, also a reduction in force case, keeping a much younger employee and letting respondent go is evidence of actual disparate treatment among allegedly similarly situated employees.

A recent case from the Fifth Circuit is instructive on this issue and a proper application of the guidelines set forth by this Court. *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404 (5th Cir. 1989). In that case, the plaintiff was fired as part of a reduction in force. The employer proffered his substandard work performance which was countered by evidence that his quality of work was good. The court held that the proffered reason did not explain why Uffelman was fired while other younger, less experienced engineers were retained. No evidence of age animus was shown in connection with the disproving the employer's proffered reason. Uffelman offered circumstantial evidence on the issue. For example, "[y]ounger employees

were offered the chance to take computer training courses while Uffleman was not. This court has held that this sort of treatment is some evidence of discriminatory intent." *Id.* at 408.

The facts are remarkably similar in the instant case to that of *Uffelman*. The focus must be whether the facts taken as a whole support the verdict and not, as petitioner contends, whether proof of the discredited reasons alone is sufficient. None of the cases cited by petitioner stand for the proposition that discrediting the employer's articulated reason has to be viewed independently from the employee's other evidence. The jury was not required to, and did not, believe that the changing focus of petitioner's business meant that Walter Brooks was no longer qualified to be a serviceman, or that Fred Taylor had skills which could not be learned by Brooks in a one-day copier school.[3] It is the treatment of Fred Taylor versus Walter Brooks together with all the other evidence which supports the finding of age discrimination.

Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557 (7th Cir. 1987) likewise, does not support petitioner's position. That case involved an employee who filed a race discrimination claim when his employer fired him for missing five straight days. The district court found in favor of the plaintiff because the employer incorrectly believed that he was attending a body building competition. None of the findings of fact by the court found or even suggested that race was ever a part of the employer's

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3. Respondent offered evidence that Fred Taylor did PM work on copiers and tried to create the illusion that this was a specialized skill. However, the evidence established that PM was nothing more than cleaning up the copier which could be done by anyone with very little training.

consideration. The Seventh Circuit[4] adeptly explained the trial court's misunderstanding of pretext.

> It is easy to confuse "pretext for discrimination" with "pretext" in the more common sense (meaning any fabricated explanation for an action), and to confound even this watery use of "pretext" with a mistake or irregularity. * * * If you honestly explain the reasons behind your decision, but the decision was ill-informed or ill-considered, your explanation is not a "pretext".

Id. at 559. The district court had specifically found that the employer fired the plaintiff because it believed he was able to work during that week, thus finding the motivation was other than racial.

In the instant case, neither the Eighth Circuit nor the District Court for the Western District of Missouri misperceived the motivation for the firing of respondent. The jury, after a four-day trial, found that respondent's dismissal was because of his age. Judge Stevens, in denying the motion for judgment notwithstanding the verdict, found that there was sufficient evidence to support such a finding. The Eighth Circuit affirmed that decision citing a number of specific pieces of evidence to support a finding that the petitioner's articulated reason was found by the jury to be a pretext for age discrimination. Nowhere in any of the decisions do the courts find that the pretext was other than one attempting to conceal their true motivation—age discrimination.

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4. In two very recent decisions the Seventh Circuit has held that an ADEA plaintiff can carry his burden in response to the employer's articulated business reason for the discharge by showing that the proffered reason is false or has no basis in fact. *McMillian v. Svetanoff*, 878 F.2d 186, 189 (7th Cir. 1989); *Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1319 (7th Cir. 1989).

Finally, petitioner also cites *Holder v. City of Raleigh*, 867 F.2d 823 (4th Cir. 1989). Again, this case involved a claim of racial discrimination in which the lower court specifically found that although the proffered reason may be pretextual it was *not* to cover up its motivation of race discrimination. In affirming that decision, the Fourth Circuit held that a finding of pretext by the trial court was not enough to prove racial discrimination, especially in the face of a specific finding to the contrary. *Id.* at 827-28. This decision did not suggest that proof that the employer's proffered reason is "unworthy of credence" cannot be considered as evidence of improper motive. In fact, this Court has so held, in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978):

> "when all legitimate reasons for rejecting an applicant [or firing an employee] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer . . . based his decision on an impermissible consideration such as race [or age]."

Id. at 577.

Petitioner's contention that the Eighth Circuit improperly considered the articulated reason as a pretext fails to address the evidence as a whole. The Eighth Circuit found that the discredited reason, along with the other evidence, was sufficient to support the jury's finding. In essence, petitioner argues that once the employer has articulated its reason for the discharge, the plaintiff must show, by direct evidence, that age was the reason for the cover-up as opposed to such other motivation. However, this Court stated in *Burdine*, *supra* at 1095, in footnote 10 that:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences, properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Id. The key therefore is whether the plaintiff has presented sufficient evidence which discredited the employer's explanation and from which reasonable inferences of age discrimination as the motivation by Petitioner can be drawn by the trier of fact. In the instant case every level of review has so held. It is sufficient that the employee present circumstantial evidence from which the fact finder may draw inferences of discriminatory motive. Such indirect evidence can be used both to attack the employer's proffered explanation as well as to support the finding of discriminatory motive. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, 105 S.Ct. 613, 622, 83 L.Ed.2d 523 (1985); *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 717, 103 S.Ct. 1478, 1483, 75 L.Ed.2d 403 (1983).

Thus, it is clear that no conflict exists between the Eighth Circuit and other circuits. If the plaintiff shows that the proffered reason is totally "unworthy of credence" it has brought the question of age animus into

the equation. The fact finder must inquire into the employer's motive or state of mind. *Aikens, supra* at 716. If it finds that the reason advanced by the employer is totally devoid of belief, it may properly find that age was the motivating factor when it considers all the evidence, and the reasonable inferences to be drawn therefrom, presented in the case. In the present case the jury found that age was the motivating factor behind the decision to fire respondent and the Eighth Circuit properly found that the evidence in the case supported that finding.

II.

No Conflict Exists Between the Eighth Circuit and the Eleventh Circuit in That Both Correctly Apply the Burden of Proof Established by This Court in Burdine.

The Eighth Circuit properly applied the standard for review in an ADEA case. Petitioner is attempting to reargue the facts which the jury, the trial judge and the Eighth Circuit has already found support respondent's claim that he was fired because of his age. Moreover, Petitioner's recitation of the "facts" are conspicuously construed and even twisted in the light most favorable to the petitioner, a clearly improper use of the applicable standard for review after a jury verdict, trial judgment and appellate decision in favor of respondent. It is obvious that the jury and four separate judges have found that the "photocopier" excuse was nothing more than a guise for eliminating the oldest worker in the department. Petitioner expended great effort to make one believe that doing preventive maintenance on a copy machine was akin to brain surgery. It was not. Such work did not require extensive training or experi-

ence, and the jury understood that if the company was truly interested in doing only copier repair work that respondent with a two or three day training session could perform that work and still do work on the "computer" aspect of the business machines sold by Petitioner.

In *Carter v. City of Miami*, 870 F.2d 578 (11th Cir. 1989), cited by Petitioner, the Eleventh Circuit reversed on the grounds that Carter, the plaintiff, failed to offer *any* evidence challenging the employer's proffered explanation. Thus, only her conclusory allegation of discrimination remained, which could not support her burden. *Id.* at 585. *Carter* is easily distinguished from the present case on the basis of her failure to present *any* evidence challenging the proffered reason by the employer. In fact, her only response to the being fired for insubordination was that her personnel file was totally devoid of written reprimands. The explanation that written reprimands were not typically placed in the personnel files negated even that point.

In the instant case, there was substantial circumstantial evidence which supports the jury's finding of pretext. When reviewed as a whole the evidence clearly established that petitioner fired the oldest serviceman, who except for the former manager, was also the highest paid. In his place, they retained a man twenty years younger who was the office "go-for." The jury understood that respective serviceman's ability was based upon his knowledge and experience and that the rudimentary preventive maintenance work he performed on copiers resulted more from being the low man on the totem pole than any special skill. On his discharge papers, the reason for respondent's firing was that he "was junior service man in the systems computer division." (J.A.

p.129). All employees testified there was no systems computer division. The inference may be drawn that such an explanation was fabricated to cover the real motivation. That fabrication further supports the jury determination of pretext when it is viewed in the context of retaining a person who had only been employed a little over a year and did the "low-rung" jobs. (1Tr. p.26 ls.6-14; 1Tr.p.121 ln.24-p.122 ln.6; 2Tr.p.6 ls.1-15). Further, the petitioner who knew computers could easily have adapted to copiers, many of which had computer components that he repaired. (1Tr.p.195 ls.15-17; 2Tr. p.4 ls.3-10).

By its very nature, retaining an inexperienced 34-year old and firing a qualified and competent man who had nearly 30 years with the company demands an explanation other than he "was junior service man in the systems computer division." When the company falls far short of offering a true and credible explanation for its actions, the fact finder is justified in arriving at a conclusion of age discrimination based upon all the evidence and reasonable inferences drawn therefrom. Petitioner attacks each piece of evidence recited by the Eighth Circuit with a one-sided version of the evidence that the jury has already rejected. Therefore, petitioner is left to argue that no direct evidence of age animus was presented. But, as this Court has held, direct evidence of age animus has been specifically rejected as the only available means to respondent to prove age discrimination. Petitioner would have this Court stop the *Burdine*, *supra*, burden of proof analysis at the point where the employer articulates some business reason for its discharge of the employee with no ability for the employee to rebut the employer's proffered reason other than with direct evi-

dence of age discrimination. Such is not the standard developed by the Court and currently followed by all Circuit Courts of Appeals, no matter how long and hard Petitioner wishes or desires that standard be adopted. As the Eighth Circuit properly noted, "[a]lthough no single piece of Brooks' indirect evidence proves discrimination, the evidence viewed in its entirety was sufficient to support the jury's verdict." (A.24). Such was the proper standard for review and in no way is in conflict with the Eleventh Circuit or, for that matter, any other circuit. It is not a proper ground to seek a writ of certiorari simply to review the sufficiency of facts which on three prior occasions have been found to be sufficient.

CONCLUSION

Petitioner has failed to establish that the instant case falls within the appropriate guidelines set forth in Rule 17 for a writ of certiorari. Despite its attempts to find a distinction, the cases from the other circuits are not in conflict with the Eighth Circuit and have properly applied the *Burdine* burden of proof. Further, Petitioner has focused on a phrase from an Eleventh Circuit decision in an effort to create a conflict where clearly none exists.

The Supreme Court should deny the petition for writ of certiorari in that it is nothing more than Petitioner's attempt to obtain yet another review of the facts which have been found at every level of review to be sufficient to support the jury's finding that Petitioner discriminated against respondent on the basis of his age.

Respectfully submitted,

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